BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BILLY LEONARD WILSON Claimant	)	
VS.	)	
MIDWEST PLASTIC, INC. Respondent	)	Docket No. 1,026,655
AND	)	
COMMERCE & INDUSTRY INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 29, 2006 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The claimant alleged he suffered repetitive injuries to his right upper extremity and all other affected body parts through his last day worked for respondent on November 11, 2005. At the preliminary hearing he sought medical treatment and temporary total disability compensation if taken off work during such treatment. Respondent denied claimant suffered accidental injury arising out of and in the course of employment and further denied timely notice of injury.

After the June 28, 2006 preliminary hearing the Administrative Law Judge (ALJ) entered an Order dated September 29, 2006 which designated a specific doctor to provide treatment, tests and referrals. K.S.A. 44-534a(2) provides that upon a preliminary finding that a claim is compensable an ALJ may make a preliminary award of medical compensation. Consequently, it is implicit in the ALJ's order designating an authorized doctor to provide claimant medical treatment that the underlying compensability issues of injury arising out of and in the course of employment as well as timely notice were determined in claimant's favor.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment and, if so, whether the claimant provided timely notice of the accident.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked approximately six weeks as a machine operator for the respondent. The claimant's job consisted of taking a plastic part coming out of a plastic mold injection machine every 45 seconds, using a knife to trim the excess plastic away from the part and then placing it in a storage container.

Claimant began experiencing problems with his shoulder, elbow and arm as well as his fingers going numb. As he continued working his symptoms worsened through his last day worked on November 11, 2005. Claimant testified that about once a week he would tell his lead person, Donnie, about his fingers going numb and that his shoulder and arm was hurting. On the morning of November 11, 2005, claimant again told Donnie that his arm pain was becoming unbearable but his complaint was ignored and claimant got angry and he left work.

After consultation with his attorney, the claimant then called respondent on November 14, 2005, and talked with Michael, the respondent's owner's son, who worked in the office. Claimant described the work he performed and the symptoms he was having and was told he needed to come to the office and fill out an accident report. Because he does not have transportation the claimant walked the two miles to the office but when he got there Michael Cavaness then told claimant he could not find the accident reports. Claimant asked what doctor he should go see and did not receive an answer, instead Mr. Cavaness walked into another room with the parting comment to claimant to not hurt himself on the way out the door.

Claimant's attorney referred him to Dr. Edward J. Prostic who recommended an EMG and if it confirmed the apparent carpal tunnel syndrome then surgery should be performed. Dr. Prostic attributed claimant's complaints to repetitive trauma suffered at work for respondent through November 11, 2005. The doctor did not take the claimant off work but did place some restrictions on him.

After leaving employment with respondent the claimant went to work for Tubular Service Equipment from February 7, 2006, through March 23, 2006. He quit this assembly-line job due to pain but testified that his work there did not cause his pain or symptoms to worsen instead his pain level remained constant.

Although claimant signed a document that indicated accidents were to be reported to David Hammond or David Cavaness he denied he read the document and instead was instructed by Michael Cavaness to initial and sign the document. Claimant noted the

document was signed in August of 2004 when he applied for work but he was not given a job until approximately a year later. And he believed he was provided a different document to sign when he was hired but again noted Michael Cavaness brought the document in to the break room for several employees to sign and rushed them through the signing without providing them the opportunity to read the document. Consequently, claimant denied that he was aware of the policy that work injuries were to be reported to David Cavaness. He testified:

> Q. You are aware that the policy of the employer, of Midwest Plastics that you were to report any work injury to David Cavaness?
>
> A. I was not aware of that.
>
> Q. You weren't?
>
> A. No.
>
> Q. Do you recall signing a policy that requires you to report any work related injuries to those individuals?
>
> A. I may have signed some papers, that were given to me in the break room one day, by Michael.[1]

David Hammond, respondent's plant manager, testified it was respondent's policy to report any accident to David Cavaness or himself. He further testified that the claimant did not report any accident or work-related injury to him. On the last day the claimant worked, Mr. Hammond had a conversation with him with regard to his attendance. The claimant did not indicate any work-related injury during this conversation. Mr. Hammond indicated that Donnie Haymaker was a leadman at the plant but did not have supervisory responsibilities.

The claimant testified that as he performed his repetitive work activities for respondent he began to experience pain which worsened through his last day worked for respondent. Dr. Prostic's report attributed claimant's medical condition to his repetitive work for respondent. Claimant has met his burden of proof that he suffered accidental injury arising out of and in the course of his employment with respondent.

The claimant testified that he repeatedly told, Donnie who was considered the leadman on the floor, about his problems. More significantly, claimant called respondent's office and described his work and symptoms and was directed to come to the plant and fill out an accident report. But when he arrived at the office he was not provided a report form nor directed to a doctor. Nor was he told that he needed to speak with David Hammond

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[1] P.H. Trans. at 23.

or David Cavaness. Neither Donnie Haymaker, David Cavaness nor Michael Cavaness testified to rebut claimant's assertions. Consequently, claimant has met his burden of proof to establish that he provided timely notice of accident.

Even assuming that none of the conversations claimant described had occurred it should be noted that this is an alleged repetitive trauma injury. It was disputed whether claimant's last day of work was November 11 or 14, 2005. But respondent stipulated that it received written claim on December 7, 2005. The date of accident in this case is not necessarily the last day worked as has, up to this point, been determined by a long line of cases.[2]

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[3] (Emphasis added.)

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[2] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); and *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003)

[3] K.S.A. 2005 Supp. 44-508(d).

In this case, claimant was neither taken off work nor restricted from performing the work which caused his condition. Instead, claimant left work because he became angry when his complaints of pain were ignored.

The claimant attributed his pain to his work and was aware his condition was worsening as he worked. However, K.S.A. 2005 Supp. 44-508(d) makes no mention of the date of accident being tied to a claimant's realization as to the cause of his problems.

A possible date of accident under the new statute could be when a claimant is diagnosed with a work-related condition. But K.S.A. 2005 Supp. 44-508(d)(2) requires that fact to be communicated to the claimant "in writing." Assuming Dr. Prostic's report was presented to claimant, it was dated March 6, 2006, and written claim had been provided to respondent before that date.

The last "date of accident" possibility contained in the statute is dependent upon a claimant giving written notice to the employer of the accident. Here, on December 7, 2005, claimant gave written notice of a series of accidents. This date of accident would likewise make claimant's notice timely.

It would also create the result of having a date of accident after the last date claimant worked. When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury's date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Under the statute, a claimant can receive medical treatment before the date of accident, as treatment may be undertaken well in advance of claimant receiving written notice that the condition is "diagnosed as work related." Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day worked or the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

In any event, the claimant must still meet the burden of proof that the injury arose out of and in the course of employment. That fact alone should allay any concerns that the determination of an accident date after the last day worked or at a time when the injured worker was no longer employed leads to an unreasonable result.

K.S.A. 2005 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

In the instant case, claimant was never restricted nor taken off work by an authorized physician. Absent those facts, the next possible accident date is the earliest of either the date of claimant's receipt in writing of notification that his condition was diagnosed as work related or the date he gave written notice to the employer of the injury. There was no evidence claimant received written notification that his condition was diagnosed as work related before he provided written notice to the employer. But claimant did provide respondent written notice of his injury on December 7, 2005. Consequently, under the plain language of the statute, his date of accident is December 7, 2005, and his notice was timely for the series of microtraumas occurring through his last day worked.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated September 29, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2007.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[4] K.S.A. 44-534a.

[5] K.S.A. 2005 Supp. 44-555c(k).